(1)

90-1526

NO.

Supreme Court, U.S.
FILED
MAR 11 1991
OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

MATTHEW J. DUYCK,

Petitioner

versus

THE STATE OF NEW YORK,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the trial court erred in denying Petitioner's motion to dismiss the charge against him, to wit: that he violated the Village of Southampton dress code by appearing on a public street without wearing a shirt.

2. Whether the Village of Southampton dress code is unconstitutional in that it violates Petitioner's liberty interest to choose his personal dress.

TABLE OF CONTENTS

QUESTIONS PRESENTED 1

TABLE OF AUTHORITIES ii

OPINION BELOW 2

JURISDICTION 3

CONSTITUTIONAL PROVISIONS INVOLVED 5

STATEMENT OF THE CASE 5

REASONS FOR GRANTING THE WRIT 12

CONCLUSION 17

TABLE OF AUTHORITIES

TABLE OF CASES

Anderson v. Maryland, 427 U.S. 463, 47015

Bowers v. Hardwick, 478 U.S. 186 . . 15

Kelly v. Johnson, 425 U.S. 238 . 12, 13

Kent v. Dulles, 357 U.S. 116 13

Lego v. Twomey, 404 U.S. 477, 479 . . 15

Moore v. East Cleveland, 431 U.S. 494, 503 15

DeWeese v. Town of Palm Beach, 812 F. 2d 1365 . . . . . 8, 14

People v. O'Gorman, 274 NY 284 8

TABLE OF STATUTES

28 U.S.C. §1257(3) 4

Southampton Village Code §82-14. . . . . .2, 5, 11

NO.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

MATTHEW J. DUYCK,

Petitioner

versus

THE STATE OF NEW YORK,

Respondent

PETITION FOR WRIT OF CERTIORARI

To: THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

Petitioner, MATTHEW J. DUYCK, respectfully requests that a writ of certiorari to review the order of the New York State Court of Appeals, by the Hon. Fritz W. Alexander, II, dated November 14, 1990, which denied permission to appeal a decision and order, dated May 22, 1990, of the New York State Supreme Court, Appellate Term for the 9th and 10th Judicial Districts, (which decision is cited in the New York State Official Reports at 146 Misc. 2d 629, and in the unofficial reports at 559 N.Y. Supp. 2d 79) which decision and order affirmed a judgment of conviction entered against the Petitioner by the Justice Court of the Town of Southampton, Suffolk County, New York, rendered on February 24, 1989, said conviction being for violation of a Southampton Village Ordinance (Southampton Village Code §82-14/Improper Attire, Dress

Code) in that the Petitioner, a male, appeared on a public street without wearing a shirt. Copies of all opinions, decisions and orders are appended.

On February 11, 1991, the Hon. Thurgood Marshall, Associate Justice of the Supreme Court of the United States issued an order extending the time for filing of a petition for a writ of certiorari in this case up to and including March 12, 1991.

JURISDICTION

The order of the New York State Court of Appeals denying permission to appeal to that Court was entered on November 14, 1990. A request for an exemption of time to file a petition for a writ of certiorari was served on February 6, 1991, and such application was granted by

Justice Marshall on February 11, 1991, thereby extending the time for filing to and including March 12, 1991. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Fourteenth Amendment of the United States Constitution which in relevant parts states:

> Nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. Course of Proceedings

The Petitioner, MATTHEW J. DUYCK, was arrested on September 5, 1987, in the Village of Southampton, County of Suffolk, State of New York, for violation of the Southampton Village Code §82-14 in that he refused to wear a shirt in violation of that code provision. This charge, a non-criminal violation was filed in a Justice

Court of the Town of Southampton (the Incorporated Village of Southampton is contained wholly within the Town of Southampton). The Petitioner pleaded not guilty. On April 8, 1988, Petitioner retained counsel for his defense. On June 10, 1988, Petitioner appeared in court with co-counsel who was then retained. Co-counsel requested time to make pre-trial motions, which was summarily denied as being untimely. Co-counsel then informed the court and the prosecutor that he anticipated making a trial order of dismissal and that he would be submitting a memorandum of law in support of that motion. Co-counsel served a copy of that memorandum of law prior to the trial date to allow the court and prosecutor to study the issues raised. This memorandum of law raised the issue that the Village's dress code was violative of the Fourteenth

amendment in that it deprived the Petitioner of his liberty interest to choose his personal dress. Subsequent to the filing of this memorandum of law, the court, with the consent of the prosecutor, agreed to treat it as a motion to dismiss. All parties agreed that a trial was unnecessary since there was no dispute as to the facts of the case. The People submitted opposing papers. On October 3, 1988, the Hon. Paul H. Smith, Town Justice, issued a decision on the motion denying Petitioner's application in all respects. Since the Petitioner had submitted to the Court that there were no issues of fact to be tried, Petitioner thereafter, on February 24, 1989, pled guilty to the charge and was fined $100. The fine was promptly paid. The Petitioner then appealed his judgment of conviction to the New York State Supreme

Court, Appellate Term for the 9th and 10th Judicial Districts. Petitioner again raised the issue that the Village dress code violated his liberty interest protected by the due process clause of the Fourteenth Amendment. The Supreme Court, Appellate Term, upheld Petitioner's conviction in a decision and order dated May 22, 1990. The Appellate Term based its decision upon a New York Court of Appeals case People v. O'Gorman, 274 NY 284. However, the Appellate Term also noted that the O'Gorman case is of doubtful viability chiefly because of the case of DeWeese v. Town of Palm Beach, 812 F. 2d 1365. However, the Appellate Term held that "...It is the opinion of this Court, that any departure or modification of the opinion in O'Gorman, should come from the Court of Appeals, and not from an intermediate Appellate Court (citations

omitted). We are therefore constrained to affirm the finding of guilt by the Court below."

The Petitioner then sought leave to appeal the Appellate Term's decision to the New York State Court of Appeals. Such application was made to the Hon. Fritz W. Alexander II, Associate Justice of the Court of Appeals, and again raised the issue that the Village dress code was violative of the Fourteenth Amendment. On November 14, 1990, Judge Alexander issued a certificate denying leave to appeal to that Court.

B. Facts Relevant to the Questions Presented

This case comes to this Court devoid of any factual dispute. The action of the Petitioner of removing his shirt is not contested. The Petitioner removed his

shirt for the purpose of challenging the validity of the Village dress code. The Petitioner is a resident of the Village of Southampton. He is an artist who works with another artist, Larry Rivers. For three years prior to his arrest, the Petitioner would jog through the Village. Depending upon the weather, the Petitioner would occasionally jog without wearing a shirt. In the summer of 1987 the Petitioner noticed that the Village had erected signs stating that all persons must have "proper dress" while on Village streets pursuant to its local code. The Petitioner and others organized a walking demonstration to protest the Village's dress code. These persons dressed in unusual attire (i.e., gorilla outfits, viking helmets) and carried signs referring to and protesting the Village dress code. They walked the main streets

of the Village explaining to persons on the street that the Village required all persons on the street to be in "proper attire". The demonstrators explained their position with regard to the dress code, and solicited opinions from other persons on the street. As part of this demonstration, the Petitioner was walking on the street without a shirt, but clothed from the waist down. The Petitioner was then arrested and charged with violation of §82-14 of the Southampton Village Code. This ordinance states, "No person shall appear in a public street in said Village clothed or costumed in such a manner that the portion of his or her breast below the top of the areola is not covered with a fully opaque covering."

REASONS FOR GRANTING THE WRIT

THE SOUTHAMPTON VILLAGE DRESS CODE IS UNCONSTITUTIONAL IN THAT IT VIOLATES PETITIONER'S LIBERTY INTEREST TO CHOOSE HIS PERSONAL DRESS

The Southampton Village dress code seeks to regulate the dress habits of the general public. The Petitioner was arrested for the violation of this code even though his manner of dress was not alleged to be obscene or lascivious. This Court has not directly ruled upon a municipality's right to regulate the personal dress of the citizenry at large. In Kelly v. Johnson, 425 U.S. 238, this Court held that a police department may impose reasonable grooming restrictions upon its personnel. The opinion in Kelly emphasized that it upheld the regulations because they dealt only with the particular group of public employees and not the general public. Justice

Renquist's opinion assumed, for the purpose of that case, that the "citizenry at large has some sort of liberty interest within the Fourteenth Amendment in matters of personal appearance." Kelly, supra at 244. In Kelly, this Court acknowledged that its previous case offer little, if any, guidance on the issue as to whether a member of the general public has a liberty interest in choosing his own personal appearance. In Kent v. Dulles, 357 U.S. 116, this Court suggested indirectly that citizens have constitutional protection in choosing what they wear. In discussing the issue of the right to travel abroad, the Court stated, "It may be as close to the heart of the individual as the choices of what he eats or wears or reads." Kent, supra at 126 (emphasis supplied).

This case presents an excellent opportunity for this Court to rule

specifically whether the citizenry at large is constitutionally protected in choosing its personal dress. In DeWeese v. Town of Palm Beach, 182 F. 2d 1365, the Eleventh Circuit held unconstitutional a local dress code remarkably similar to the one in the Village of Southampton. The Palm Beach ordinance held, "It shall be unlawful for any person to appear in any public place in the Town of Palm Beach without the upper part of his or her body covered. Deweese, supra at 1371. Although the Southampton ordinance is more specific than the Palm Beach ordinance, the decisions of the New York Courts and the Eleventh Circuit were not in any way based upon the distinctions between the two ordinances. In affirming Petitioner's conviction, the New York Courts have allowed a municipality to maintain a dress code while the Eleventh Circuit has held

that such a dress code violates the United States Constitution. Thus there is a conflict between the decisions of the highest State Court and of a Federal Court of Appeals on a federal question, and certiorari should be granted for this reason. See Lego v. Twomey, 404 U.S. 477, 479, Anderson v. Maryland, 427 U.S. 463, 470. The question that this Court can decide by accepting this case is whether a person has a fundamental liberty interest in the way that he or she dresses. The Court has described a fundamental liberty as one that is "...deeply rooted in this nation's history and tradition." Moore v. East Cleveland, 431 U.S. 494, 503. See also Bowers v. Hardwick, 478 U.S. 186. The issue presented is of importance to the general public not merely to the Petitioner. Given the clarity of the issue presented and the lack of any

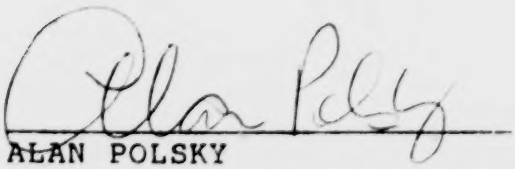
factual dispute, this case presents the ideal opportunity for this Court to specifically rule on an important issue of individual liberty that has not previously been ruled upon by this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be issued to review the judgment of the New York State Court of Appeals.

Dated: March 9, 1991
Bohemia, New York

Respectfully submitted,



ALAN POLSKY
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(516) 589-6270

INDEX TO EXHIBITS

"A" Certficate denying leave to appeal to the New York State Court of Appeals

"B" Order of Appellate Term

"C" Decision of Appellate Term

"D" Decision of Justice Court

STATE OF NEW YORK
COURT OF APPEALS

BEFORE: HON. FRITZ W. ALEXANDER II,
ASSOCIATE JUDGE

THE PEOPLE OF THE STATE OF NEW YORK

Respondent,

-against-

MATTHEW J. DUYCK,

CERTIFICATE DENYING LEAVE

Appellant.

I, FRITZ W. ALEXANDER, II, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein, there is no question of law presented which out to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated at New York, New York

November 14, 1990

S/ _____
Associate Judge

Exhibit A

Description of Order: Order of the Appellate Term, 9th and 10th Judicial Districts, entered May 22, 1990, affirming a judgment of the Justice Court of the Village of Southampton, Suffolk County, rendered on February 24, 1989.

Exhibit A

90-117
May 1990 Term

At a term of the Appellate Term of the Supreme Court of the State of New York for the 9th and 10th Judicial Districts in Westchester County on May 22, 1990

Present: ANDREW J. DiPAOLA,
Presiding Justice
PATRICIA D. COLLINS
ANGELO J. INGRASSIA, Justices

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

vs.

MATTHEW J DUYCK,

Appellant

The above named appellant appealed to this court from a judgment of Justice Court of the Village of Southampton, Suffolk County, rendered on February 24, 1989 convicting him, of the following violation:

Violation of Section 82-14 of the Village Code

Exhibit B

and imposing sentence as follows:

$100 Fine

and the said appeal having been argued by Alan Polsky, Esq., for appellant;

and argued by David J. Gilmartin, Esq., for the respondent;

and due deliberation having been had thereon:

It is hereby ordered and adjudged that the judgment of conviction is affirmed. All concur.

Alan Polsky, Esq.
1209 lakeland venue
Bohemia, NY 11716

Vincent F. King, Esq.
Town Attorney
11 Main Street
Southampton, NY 11968
ATT: David J. Gilmartin, Es.

S/_____
JOHN A. CAHILL
CHIEF CLERK
APPELLATE TERM

Exhibit B

(1491T)
SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE TERM: 9th and 10th JUDICIAL DISTRICTS

----------X

PRESENT: DiPAOLA, P.J., COLLINS and INGRASSIA, J.J.

----------X

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,
No. 90-117

-against-

DECIDED

MATTHEW J. DUYCK,

Appellant.

----------X

Appeal by defendant from a judgment of the Justice Court of the Village of Southampton, Suffolk County (Sharrets, J - Pleas and Sentence; Smith, J. - Decision) rendered February 24, 1989 convicting him of violating section 82-14 of the Village Code and imposing a fine of $100.

Judgment of Conviction affirmed.

Defendant was charged with violating the abovementioned section in that while walking in the Village, he "refused to wear a shirt". The ordinance in question

is part of Chapter 82 of the Village Code which deals with"peace and good order" and is found within Article II, entitled, "Public Attire". Defendant moved to dismiss the charge against him on the ground that it was unconstitutional in that it did not bear any reasonable relationship to the public health safety or welfare. The court below denied the motion and defendant pleaded guilty.

The ordinance in question provides that:

> "No person shall appear in a public street in said Village clothed or costumed in such a manner that the portion of his or her breast below the top of the areola is not covered with a fully opaque cover."

Defendant's main contention finds support in the case of DeWeese v Town of Palm Beach, (812 F2d 1365) in which a similar provision was held unconstitutional in that it was not "rationally related" to any interest of

the Town. The court also rejected the contention by defendant that he had a right to choose his own clothing as being a fundamental constitutional right (Kelly v Johnson, US 238; Karr v Schmidt, 460 F2d 609, cert den US 989). A possible claim of freedom of expression under the First Amendment was also rejected in DeWeese, citing Florida Free Beaches Inc. v City of Miami, (734 F2d 608, 610-611).

On the other hand, ordinances based solely on esthetics have been upheld by the courts (see 56 Am Jur 2d, Municipal Corporations, Etc., § 489, p 537, 25 NY Jur 2d, Counties, Town, Municipal Corporations, § 240). Critical to the issues in this case is the case of People v O'Gorman, (274 NY 284) which concerned an ordinance of the City of Yonkers, that required people to wear "customary street attire" when walking the streets of the

city. The court stated (at p 286):

> "The law of the proper thing to do is not written in a book but rules most of our living. To meet the cases of persons who insist on being conspicuous by exposing too much of their anatomy, it may be reasonable to prescribe that men and women shall cover themselves, at least when on the street."

While the DeWeese case and the case of People v Price (31 NY2d 831, 832) would seem to raise a question as to the continued viability of the O'Gorman, case (supra), it is the opinion of this court, that any departure or modification of the opinion in O'Gorman, should come from the Court of Appeals and not from a intermediate appellate court, (see, Bouriois Sales Corp v Dorfman, 273 NY 167, 170; MacGilfrey v Hotaling, 26 AD2d 977, 978). We are therefore constrained to affirm the finding of guilt by the court below.

All concur

Exhibit C

JUSTICE COURT
TOWN OF SOUTHAMPTON
116 HAMPTON ROAD
SOUTHAMPTON, LONG ISLAND, NY 11968

JUSTICES
MERCATOR C. KENDRICK PJ
PAUL H. SMITH
EDWARD P. SHARRETTS

COURT CLERK
(516) 283-6000

THE PEOPLE OF THE STATE OF NEW YORK

v.

MATTHEW J. DUYCK

DECISION

A complete review of motions, memoranda and affidavits submitted directing a dismissal of the above-captioned matter does not prove to this Court beyond a reasonable doubt that the Defendant's constitutional rights have been violated.

This Court hereby upholds the wording of Southampton Village Code 82-12,denies

Exhibit D

in all respects the Defendant's motion to dismiss the charge, and schedules the matter for an appearance date for disposition on October 12th, 1988, at 1:00 P.M.

S/_____
Paul H. Smith
Town Justice

Dated this 3rd day of October, 1988.
Town of Southampton, New York.

Exhibit D